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Nos. 06-713, 06-730

Supreme Court, U.S
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Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS,

Respondents.

STATE OF WASHINGTON; ROB McKENNA, Attorney General; and SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; DIANE TEBELIUS; BERTABELLE HUBKA; STEVE NEIGHBORS; MIKE GASTON; MARCY COLLINS; MICHAEL YOUNG; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; and J.S. MILLS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA DEMOCRATIC PARTY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

By the written consent of all the parties, the California Democratic Party ("CDP") respectfully submits this amicus curiae brief to assist the Court in its consideration of the issues presented in this case.[1] CDP is the duly authorized and officially recognized Democratic Party of the State of California. It is an unincorporated association of individuals who have joined together to advance common political beliefs. For more than a century, CDP has nominated candidates for public office either by convention or by primary election. Participation in CDP's primary elections is limited by the terms of CDP's by-laws. While those by-laws previously limited participation to CDP members, they were recently changed to allow independents to participate in the primary as well.

Throughout this process, CDP spends considerable time and expense to ensure that voters clearly understand what CDP stands for and what it means to be a "Democrat" in California. CDP is also intimately acquainted with how so-called "blanket primary" election systems, even "modified" systems like Initiative 872, can severely burden political parties' core associational rights guaranteed by the First Amendment to the United States Constitution. CDP served as lead plaintiff in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) precisely because it believed that the primary system adopted by the voters in that case substantially interfered with the Democratic

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus has made a financial contribution to the preparation or submission of this brief.

Party's ability to maintain and protect the integrity of the message conveyed by the use of the label "Democrat."

CDP believes that the "modified" blanket primary adopted by the Washington voters presents exactly the same threat to the associational rights of the political parties because it eliminates the party's ability to control its message (and its messengers) in the same way. CDP thus has a significant interest in the Court's consideration of the blanket primary system at issue in this case.

SUMMARY OF ARGUMENT

A political party's message is its *raison d'etre*. Also known as a "platform," it is the public expression of the common political beliefs around which its members associate in the first place and which, ultimately, directs their collective action. Voters who share the beliefs espoused by the Democratic Party platform reasonably expect that when "Democratic" candidates on the ballot are elected to office, they will vote in ways that are consistent with the voter's views on such vital public policy areas as the environment, health care, and education. The Democratic Party platform is also used to recruit new voters to support Democratic candidates and candidates who will advance those views. Simply put, the Party's message – as advanced through its candidates – reflects "what it means to be a Democrat."

A political party's ability to control its message is essential to its ability to carry out its core functions. This Court's decisions have thus long held that the First Amendment guarantees political parties the freedom to control their internal affairs. This freedom necessarily

includes the right to identify those candidates who are qualified to carry the party label on the ballot, free from outside interference. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). Thus, in *Jones*, this Court struck down a blanket primary system adopted by California voters because it violated a political party's "right not to associate" by allowing non-members to determine the identity of the party's standard bearer.

The blanket primary system that Initiative 872 would establish strikes at the heart of the very same associational freedoms that animated this Court's decision in *Jones*. Its unabashed purpose is to directly effectuate a change in the political parties' ideologies by forcing those who carry the party labels to espouse views that appeal to non-party adherents. It seeks to accomplish this goal by permitting anyone *without qualification* to affiliate with the Democratic Party on the primary ballot by expressing a "preference" for the Party. All voters, regardless of their party preference,[2] are then permitted to determine which of these self-identified Democratic candidates, if any, will appear on the general election ballot. Initiative 872 would therefore effectively establish a partisan primary system in which the political parties themselves are denied any formal role in determining the identity of their standard bearers.

This system unquestionably imposes severe burdens on political parties' protected First Amendment freedoms. By wresting control over who may hold themselves out on

[2] The State of Washington does not register voters on the basis of their affiliation with any particular political party. WASH. REV. CODE § 29A.04.205 (2007).

the ballot as a "Democratic" candidate from party adherents and giving it to non-party members, Initiative 872 would have the direct effect of weakening the link between such candidates and the Democratic Party's platform. A candidate with views totally anathema to the Party's could nonetheless express his or her "preference" on the ballot for the Democratic Party. By forcing the Democratic Party to be associated on the ballot with such a candidate, Initiative 872 would lead to the perception among voters that the Party tolerates, or even approves of, the views expressed by such a candidate. Over time, this system would seriously degrade the meaning of the Democratic Party's label until, eventually, it ceases to be a reliable indicator of the views underlying the Party's very existence.

The State of Washington and Initiative 872's sponsor, the Washington State Grange, attempt to defend the measure's intended effect of altering political party ideology by clothing it in the language of "nonpartisan" and "party preferences." They point to language in this Court's decision in *Jones* suggesting that such a system would serve the State's asserted interest in greater access to the ballot and improved choice for voters. But Initiative 872 is not a nonpartisan primary because it allows all voters to choose among a pool of self-identified party candidates to determine who will be associated with a given party on the general election ballot. And the argument that a "party preference" does not convey the same impression of formal association as a party designation in the minds of the voters merely elevates form over substance, particularly since Washington law does not otherwise provide a formalized method for determining whether a candidate is "affiliated" with or a "member" of a particular party. The

interests identified by the State in support of Initiative 872 are neither compelling nor even sufficiently important to outweigh the substantial interference with the parties' associational rights caused by the measure.

Nor is it any answer to the severe associational burdens imposed by Initiative 872 to say that parties are free to engage in independent speech to differentiate candidates. This Court's decisions are clear that such a "forced response" is antithetical to the freedoms guaranteed by the First Amendment. This Court's decisions have also recognized that party endorsements are no substitute for the ability of the party to select its own standard bearer. Moreover, to the extent parties are forced to engage in such differentiation, the frequency and degree to which they can communicate that message is limited by state and federal campaign finance laws.

In sum, Initiative 872 seeks to retain the advantages associated with party labels on the ballot, including the benefit of voter "cues" to differentiate among the candidates' positions, without providing political parties the independent ability to control the content of the message attributed to them through the use of those labels. Consequently, Initiative 872 shares the same constitutional defect as the blanket primary struck down in *Jones* and should likewise be declared unconstitutional. The decisions of the district court and the Ninth Circuit should thus be affirmed.

ARGUMENT

I. The First Amendment Necessarily Guarantees A Political Party the Right to Determine and Control the Content of Its Message

This Court's decision in *Jones* reaffirmed that the freedom guaranteed to a political party by the First Amendment to control the content of its message flows directly from the nature of a political party as a vehicle for collective political expression. Political parties exist as a means for groups of individuals to band together "in furtherance of *common* political beliefs." *Jones*, 530 U.S. at 574 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986)) (emphasis added). The associational freedom that the First Amendment guarantees a political party thus "necessarily presupposes the freedom to identify the people who constitute the association, and *to limit the association to those people only.*" *Id.* (quoting *La Follette*, 450 U.S. at 122) (emphasis added). Without these freedoms, a political party would be unable to "limit control" of its actions and expressions to persons who share the common political goals for which the party was formed in the first place. *Id.* at 575 (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW 791 (1978)). The existence of political parties as effective tools for collective political expression therefore depends on their ability to control their message.

The method by which political parties communicate their message to the public at large is through the candidates who carry the party's label on the ballot. These "standard bearers" are the face of the party in their community and serve as a central point of contact between the community and the political party. Parties choose candidates "in order to *represent* their ideas and interests

in the election." Joint Appendix filed by parties in *Jones* at 57 (Expert Report of Bruce Cain, hereinafter "*Jones* App. __.") (emphasis added). Recognizing the critical role that candidates play in disseminating a party's message, this Court in *Jones* observed that a political party's associational rights are at their zenith in the "process of selecting its nominee." *Jones,* 530 U.S. at 575. This is because the selection of a party's standard bearer will "often determine[] *the party's positions* on the most significant public policy issues of the day." *Id.* (emphasis added). Even when those positions have been pre-determined, for instance by the content of the party's platform, it is the candidate to whom the task of "winning [] over" the general electorate to the party's views is entrusted. *Id.*

In *Jones*, the Court struck down California's blanket primary because it unconstitutionally infringed on these principles. The blanket primary system adopted by California voters through Proposition 198 permitted non-party members to determine the identity of the candidate who would ultimately carry a given party's label on to the general election. *Jones*, 530 U.S. at 577. Proposition 198 thereby "force[d] political parties to associate with – to have their nominees, *and hence their positions*" determined by non-party members. *Id.* (emphasis added). Citing Proposition 198's "*intended* outcome [] of changing the parties' message," the Court noted that it "could think of no heavier burden on a political party's association freedom." *Id.* at 581-82 (original emphasis). Thus, California's blanket primary system severely burdened a political party's associational rights by stripping it of the autonomy to control its message vis-à-vis the selection of its standard bearers.

Relying on the Court's pre-*Jones* decisions articulating these same principles, the circuit courts have consistently upheld a party's right to determine which individuals are qualified to use the party's label on the ballot. Thus, the Eleventh Circuit upheld the right of members of the Georgia Republican Party to prevent David Duke from appearing as a Republican candidate in Georgia's Republican presidential preference primary. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992). The court found that Duke's asserted "right to associate with an 'unwilling party'" was outweighed by the Republican Party's right to identify the persons "who constitute" the party and to exclude from it those persons who, in the party's determination, do not share its political beliefs. *Id.* at 1530 (citing *La Follette*, 450 U.S. at 121-22). This right to "self-determination" included the right to "select a standard bearer who best represents the party's ideologies and preferences." *Id.* at 1531 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).[3]

Similarly, the D.C. Circuit upheld the Democratic National Committee's right to determine who constitutes a "bona fide Democrat" for purposes of allocating delegates to the Democratic National Convention at which the Party's nominee for President is selected. *Larouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998). In so holding, the Court of Appeals noted the importance of "[a] party's effort to limit the list of candidates *who can represent themselves to the voters as Democrats*" as critical to the party's goal of

[3] The Eleventh Circuit subsequently rejected, on essentially the same grounds, a § 1983 challenge by Duke to the Georgia statute regulating presidential preference primary candidate selection. *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996).

winning elections. *Id.* at 996 (emphasis added). These efforts allow the Party to "define its values, distinguish them from those of its competitors, and thereby attract like-minded voters." *Id.*

While these decisions may have involved more traditional partisan forms of candidate selection, the principle underlying the holding of each is the same as in *Jones*: the integrity of a political party's identity necessarily depends on the party's ability to control how its message is conveyed to the electorate and by whom.

Consistent with its treatment of political parties, this Court's decisions have also recognized that private organizations generally enjoy a First Amendment right to "autonomy over [their] message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995). As with the associational rights discussed in *Jones*, this right protects an organization's ability to control the persons with whom they are publicly associated. "[T]hat choice is presumed to lie beyond the government's power to control." *Id.* at 575. This right to autonomy is based on the principle that the integrity of a private organization's identity necessarily requires that it be free from government-compelled associations that could be "perceived" as signaling its acceptance of certain views. *Id.*

Thus, in *Hurley*, this Court held that the state could not constitutionally compel the private organizers of a St. Patrick's Day parade, the South Boston Allied War Veterans Council, to allow certain groups to march in the parade whose message was deemed inconsistent with the Council's desired message and whose inclusion might give the mistaken impression that the Council approved or

supported the groups' message. *Hurley*, 515 U.S. at 574-75. The Court recently reaffirmed this aspect of a private organization's protected First Amendment freedoms in concluding that deference must be given not only to an organization's "assertions regarding the nature of its expression," but also to the organization's "view of what would impair its expression." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (citing *La Follette*, 450 U.S. at 123-24).

As the foregoing decisions illustrate, the First Amendment protects a political party's ability to define with whom and on what terms it associates as a necessary corollary of the right to shape the content of the party's own message. This includes the right to exclude from its ranks those whose views are inconsistent with the common principles shared by party members, and it also includes the right to exclude association with those whose public affiliation could lead to the perception that the party approves or supports views that the party may disagree with, or simply may not want to explicitly endorse.

II. Initiative 872 Severely Burdens A Political Party's First Amendment Right to Control Its Message

In reviewing the constitutionality of Initiative 872, the Ninth Circuit applied the balancing test this Court has set forth for determining whether a state election law violates associational rights. First, it weighed the "character and magnitude of the burden" that Initiative 872 imposes on the organization's associational freedoms. *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1116 (9th Cir. 2006) (citing *Timmons v. Twin Cities Area New*

Party, 520 U.S. 351, 358 (1997)). In so doing, the Court of Appeals recognized that while "reasonable, nondiscriminatory" burdens do not trigger strict scrutiny, "severe" burdens do, and election laws that severely burden political parties' First Amendment rights must be "narrowly tailored and advance a compelling state interest." *Id.*

The Ninth Circuit correctly determined that Initiative 872 severely burdens the associational rights of political parties and is thus subject to strict scrutiny because it would establish an "overtly partisan" election system wherein candidates are permitted to self-identify with any political party on a primary ballot that is presented to the general electorate. *Id.* at 1118. It concluded that Initiative 872 creates a nonconsensual impression of association between the party and those candidates who choose to state their preference for it, therefore stripping the political parties of their ability to independently control their message and degrading the value and integrity of the party's label as an indicator of its message. In so doing, Initiative 872 also substantially interferes with parties' ability to effectively manage their internal affairs.

Significantly, this Court's decisions indicate that deference should be given to the views of the political party-plaintiffs that the burdens imposed by Initiative 872 would be severe. A court "may not constitutionally substitute its own judgment" for that of the political parties in characterizing the burden that a state election law will impose upon the parties' internal processes. *La Follette*, 450 U.S. at 124. *See also Dale*, 530 U.S. at 653 (noting that deference must be given "to an association's view of what would impair its mission"). The conclusion of each political party in this case that Initiative 872 would significantly burden its associational right is amply supported.

A. Initiative 872 Operates as a Partisan Primary that Severely Burdens the Political Parties' Associational Rights

In asserting that Initiative 872 is a permissible "nonpartisan" primary, the State of Washington and the Grange rely heavily on the description in *Jones* of a hypothetical nonpartisan blanket primary:

> Generally speaking, under such a system, the State determines what *qualifications* it requires for a candidate to have a place on the primary ballot – which *may include nomination by established parties and voter-petition requirements for independent candidates.* Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. *This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.* Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association.

Jones, 530 U.S. at 585 (emphasis added).

The Ninth Circuit correctly understood that the crucial attribute of the "nonpartisan system" described in *Jones* was the separation of the party's candidate-selection process from the primary election process. *Washington State Republican Party*, 460 F.3d at 1118. This does not mean, however, that anyone wishing to participate in the primary may unilaterally connect himself or herself to a particular party. The "qualifications" referred to in *Jones*

may include selection by the respective parties through a wholly private nominating process but it seems clear that, whatever process is used, it presumably includes *some mechanism* for determining that a candidate who holds himself or herself out as affiliated with the party is so in fact. Indeed, the need to have *the parties themselves* directly involved in the process is even more pressing in states like Washington where voters are not registered by party affiliation.[4] In the absence of either required party registration or a party candidate selection process, Initiative 872 virtually eliminates any party control over the use of its name (and message) by a candidate.

Petitioners assert that because Initiative 872 does not purport to "nominate" candidates, only "winnow" them, it is nonpartisan. (Wash. Br. 14; 19-21; 25-35.)[5] But this argument elevates form over substance. As the Ninth Circuit concluded, in all relevant ways contemplated by *Jones*, Initiative 872 operates like a "partisan" primary and, in so doing, exhibits the same fatal flaw that doomed California's primary. *Washington State Republican Party*, 460 F.3d at 1111.

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[4] The absence of party registration constitutes one significant difference between the Louisiana system and Initiative 872; unlike the latter, Louisiana law requires a candidate to be a registered member of the party that he or she affiliates with on the ballot. LA. REV. STAT. ANN. § 18:463A(1)(a) (2007). There appear to be other differences, not the least of which is the apparent support of the Louisiana political parties for the system and the fact that it governs only state elections. *See generally* John R. Labbé, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U.L. REV. 721 (2002).

[5] Citations to Petitioner State of Washington's brief are set forth as "Wash. Br. ___." Citations to Petitioner Washington State Grange's brief are set forth as "Grange Br. ___."

While cloaked in the nomenclature of a nonpartisan system, the blanket primary provided in Initiative 872 bears the same partisan characteristics and constitutional infirmities as the overtly partisan blanket primary struck down in *Jones*. As a threshold matter, by providing for the inclusion of party "preferences" on the ballot, Initiative 872 at the very least introduces the concept of partisanship into the election process. Under its terms, anyone can anoint himself or herself as the Democratic Party's ambassador to the electorate by simply expressing a "preference" for the Party. It provides no "qualifications" for this representation whatsoever. All voters, regardless of party affiliation, are then permitted to determine which of the candidates who have expressed their "preference" for the Democratic Party, if any, will appear on the general election ballot as being affiliated with the party and its beliefs. Thus, the practical effect of Initiative 872, like the blanket primary in *Jones*, is that all voters are permitted to select the identity of a party's standard bearer. And, just as in *Jones*, this system directly interferes with – and therefore burdens – the parties' associational rights to control their message.

In fact, one need look no further than Initiative 872's avowed purpose of altering the ideology of political parties and the candidates to conclude that it imposes a significant burden that must be subjected to strict scrutiny. In extolling voters to support the measure, the Grange explained that under its terms "[p]olitical parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (JA 406 (Official Voters' Pamphlet)).[6] This intended outcome is

[6] Citations to "JA" refer to the parties' Joint Appendix.

indistinguishable in design and effect from that which the proponents of California's blanket primary sought to achieve, and what the Court described in *Jones* as imposing the highest imaginable burden on the political parties' associational rights. *Jones*, 530 U.S. at 581-82. The result is a system in which the value of the political parties' labels as indicia of their ideological footing is intentionally eroded, and their ability to effectively manage their internal affairs is severely compromised.

1. Initiative 872 Imposes A Severe Burden on a Party's Ability to Control the Message Conveyed to the Electorate

As evidence presented to the district court suggests, political parties expend considerable time and expense defining their platform and creating "a corresponding 'brand awareness' among the electorate for candidates identified as Democrats." (Berendt Decl. 5, ¶ 10:11-14.)[7] Central to this concept of "brand awareness" is the integrity of a party label as a symbolic expression of its core principles and beliefs. "Party labels provide a shorthand designation of the views of party candidates on matters of public concern." *Tashjian*, 479 U.S. at 220. When a party loses the ability to control the use of its label, it therefore loses control of its message, including "what the party stands for and what is communicated to the voters about the parties." *Jones* App. 60.

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[7] Citations to "Berendt Decl." refer to the Declaration of Paul J. Berendt in support of Plaintiff-Intervenor Washington State Democratic Central Committee's Motion for Summary Judgment submitted to the District Court, found at JA 243 *et seq.*

Permitting candidates to appear on the ballot alongside his or her "preferred" party label without qualification infringes on a political party's right to control its message by creating a forced impression of association between the party and a candidate whose views it may find repugnant. This Court's decisions have recognized that this type of forced public affiliation severely burdens an organization's right to autonomy over its message because it creates the perception of an association between the organization and persons or groups whose views it may not share. *Dale*, 530 U.S. 640; *Hurley*, 515 U.S. 557. Yet, this is precisely the type of associational impression that Initiative 872 would foist upon political parties.

Under Initiative 872, David Duke would be free to declare his "preference" for the Washington State Republican Party and Lyndon Larouche would be free to declare his "preference" for the Washington State Democratic Party, regardless of each party's desire not to affiliate with these candidates. In fact, it is precisely because, under Initiative 872, the labels are no longer reliable indicia of party affiliation or support, and because all voters participate in the primary election – even those who are hostile to the party's message – that candidates such as Mr. Duke and Mr. Larouche may be able to defeat the party's preferred candidate and proceed to the general election ballot – neither having the backing of their "preferred" party, but both nonetheless being able to carry the party label and its message with them.

In fact, the severity of the burden that this forced affiliation will impose on political parties is arguably even greater than the burden found in *Hurley* and *Dale* because the associational perception is conveyed not simply in a private setting, but via a state-printed ballot, upon which

voters typically rely for impartial and *accurate* information in exercising the franchise. The State's reasoning in support of Initiative 872 would essentially allow the War Veterans Council or the Boy Scouts to decline association with certain persons, but then allow the State to create precisely the same forced association in election materials distributed to millions of voters.

The district court was presented with evidence that misappropriation of the party's label was, in fact, a real danger in Washington. The Washington State Democratic Central Committee submitted a declaration by the Party's chair, Paul Berendt. Mr. Berendt stated that he was aware of an instance in which a longtime Republican activist *twice* sought and won the Democratic nomination based on his belief that it would be too difficult to directly challenge the Republican incumbent in the blanket primary. (Berendt Decl. 5, ¶ 10.) This individual was able to accomplish this "without ever speaking to a Democratic Party group or obtaining [any] Democratic endorsements." (*Id.*)[8] Under Initiative 872, there would be nothing to prevent situations like the one described by Mr. Berendt from becoming the norm in Washington.

2. Initiative 872 Undermines the Institutional Value of Party Labels

The absence of any meaningful check on who is identified on the ballot with a particular political party

[8] The record before this Court in *Jones* indicated that it is common for as many as 25% of voters to cross-over in Washington primaries. *Jones*, 530 U.S. at 578. In this case, Mr. Berendt testified in his declaration that this was consistent with his experience as a Democratic Party official. (Berendt Decl. 6.)

also degrades the institutional value that party labels and/or designations play in assisting voters in registering their policy preferences. Party labels provide the voters with important "cues" about the ideological dispositions of a candidate. *Jones* App. 57. This provides predictability for voters vis-à-vis the policies and actions they may reasonably expect a candidate to pursue if elected to office. *Id.* That predictability, however, is based squarely on the assumption that the ideology of the candidate is, in fact, consistent with the ideology of the party whose label he or she carries. When candidates who carry a party's label are selected by persons outside the party, it undermines that assumption and reduces the value of the party label as a source of information for voters.

Further, there is nothing to prevent a candidate from associating with one party during the election, but subsequently pursuing polices or espousing views that are contrary to the principles of the party with whom he or she has unilaterally associated. Under Washington law, most elected offices – executive and legislative – are classified as "partisan," WASH. REV. CODE § 29A.52.111 (2007), and certain partisan-connected benefits are provided by law. *See, e.g.*, WASH. CONST, art. II, § 15 ("person appointed to fill the vacancy must be from . . . the same political party as the legislator or partisan county elective officer whose office has been vacated . . . "). In the example provided by Mr. Berendt (a Republican running as a Democrat), it is unclear which party would be the "same party" as the office-holder, as neither registration nor the election process itself any longer makes this determination reliable.

More significant than any confusion connected with filling a vacancy, however, is the confusion likely to be

caused in the minds of voters where, once elected, a candidate associated with one party (through his or her stated "preference") pursues policies inconsistent with the stated party's views. At that point, a critical aspect of party identity – the expectation that, once elected, the party's standard bearers will pursue the public policies associated with the party – is completely eviscerated.

This Court recently acknowledged the importance of the party label in providing a meaningful statement about the candidate's philosophy. In *Clingman v. Beaver*, 554 U.S. 581 (2006), the Libertarian Party of Oklahoma ("LPO") challenged Oklahoma's semi-closed primary system as infringing on its right to invite registered members of other parties to participate in its candidate selection primary. *Id.* at 584-5. In rejecting the LPO's challenge, the Court explained that Oklahoma had a legitimate interest in preventing voters who "rel[y] on party labels as representative of certain ideologies" from being confused or misled. *Id.* at 594. Thus, the Court concluded that the State could prevent the LPO from opening up its primary in order to preserve "the LPO's imprimatur" as a reliable "index of its candidate's actual political philosophy." *Id.* at 595.

3. Initiative 872 Burdens a Party's Ability to Manage Its Internal Affairs

This Court's jurisprudence has consistently recognized the state's legitimate interests in confining a political party's intra-party conflicts to its own selection process in order to facilitate "political stability." *Anderson v. Celebrezze*, 460 U.S. 780, 801-3 (1983); *Storer v. Brown*, 415 U.S. 724, 736 (1974). This concept is rooted in the belief,

shared by the Founding Fathers, "that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Thus, in *Storer*, this Court recognized California could prevent "sore losers" in state-sponsored party primary elections from appearing on the general election ballot in order to reserve the general election ballot "for major struggles" and "not [as] a forum for continuing intraparty feuding." *Id.* at 735.

While this interest has been articulated most frequently from the perspective of the state, it also protects the political parties' ability to effectively govern their internal processes by ensuring finality in the process of selecting the party's standard bearer. Initiative 872 would work contrary to these principles and would, in fact, facilitate "spoiler" candidates and the perpetuation of intra-party feuds – even where parties have resorted to wholly private processes for selecting their standard bearers. *Washington State Republican Party*, 460 F.3d at 1120, n. 19. As the hypothetical in the Ninth Circuit's opinion aptly demonstrates, since there are no qualifications for candidates who wish to appear in the primary, nothing prevents a loser in the party's chosen internal process from challenging, and perhaps besting, the party's chosen standard bearer, by appealing to non-party voters in the blanket primary. In this regard, evidence was presented to the district court suggesting that such "spoiler" candidacies and "vote-splitting" affects the party's ability to effectively control its message by forcing candidates to vary their positions in an effort to "campaign to the same small group of ticket splitters, rather than to their philosophical bases." (Berendt Decl. 7, ¶ 14.)

The presence of spoiler candidates and others who seek to misappropriate a party's label can also impact other facets of a party's internal affairs as well. One of the key functions of a political party is to mobilize resources and supporters to assist party candidates in winning elections. However, Initiative 872 weakens the bond between party adherents and their preferred candidates by minimizing the adherents' role in the selection of their standard bearer. For example, if the only "Democratic" candidate on the general election ballot owes his or her success more to votes from independents and/or other party members than from Democratic voters, Democratic Party members may grow disillusioned and refuse to work for or give resources to that candidate. When spoilers win, it is less likely that party members will want to organize and help out. (*See* Berendt Decl. 6, ¶ 11.) It is also likely to be more difficult to recruit like-minded candidates to bear the party name as "party" support is no longer meaningful.

Finally, political parties seek to elect candidates with similar ideologies and thereby provide a framework for cooperation among elected officials once in office. This is how political parties ensure their ability to engage in concerted policy-making. That framework breaks down where there is no reliable connection between the ideology and the elected officeholders. In fact, the incentive for an elected official to work cooperatively with other party members is weakened when his or her electoral success is owed to independents and other groups of voters, rather than voters in his or her nominal party.

B. Neither Use of the Term "Preference" Nor the Political Parties' Ability to Speak in Response Thereto Mitigates the Burdens Imposed by Initiative 872

The State of Washington and the Grange assert that since Initiative 872 involves only a party "preference" and does not expressly provide for the "nomination" of candidates, it is distinguishable from the partisan blanket primary struck down in *Jones*. (Wash. Br. 43; Grange Br. 6.) They offer no explanation, though, for why the associational meaning of the statement "I am a candidate of the _____ party" is any different from the voters' perspective than the statement "my party preference is _____." Indeed, they seem to concede just the opposite by asserting that the latter is intended to convey "information" to the voters. (Wash. Br. 49.) In fact, to the extent that providing "information" to the voters truly is the purpose of including party preferences, it is unclear how Initiative 872 adequately serves that goal unless the statement of party preference effectively ties the candidate in the voters' minds to the message or platform of the preferred party.

Washington also claims that Initiative 872 is not a partisan primary because its provisions expressly state that it is not intended to "determine the nominees of a political party" but serves instead as a "qualifying primary" that winnows the number of candidates for the general election. (Wash. Br. 41-43.) But saying it does not make it so. As the broader panoply of Washington law makes clear, partisan concerns pervade much of the State's governance structure. And, as the history of Initiative 872 illustrates, the measure was not so much a rejection of partisan politics as much as an attempt to preserve it while altering what was considered an

excessively ideological focus of the current political parties and their candidates. (JA 406.)

As a threshold matter, Washington's reliance on *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) for the proposition that Initiative 872 is merely a "qualifying primary" is misplaced. (Wash. Br. 42.) Under the elections system this Court upheld in *Munro*, minor party candidates were first required to be *nominated by party convention* before being permitted to participate in the primary election. *Munro*, 479 U.S. at 191-92. They then were subject to the "additional requirement" of garnering at least 1% of the vote at the primary election as precondition for access to the general election ballot. *Id.* Thus, for minor party candidates, participation in the primary legitimately served a "qualifying function." *Id.*

As discussed above, however, Initiative 872 does not require a candidate wishing to appear on the primary ballot to have first been nominated by a party and, in fact, contains no restrictions on the candidates' ability to suggest party affiliation, leaving selection of the party's representative(s) to the voters as a whole. Contrary to Washington's repeated assertions, Initiative 872 cannot be accurately characterized as serving merely a "qualifying function" within the meaning of the Court's use of that phrase in *Munro*.

Washington's claim that Initiative 872 is premised on a "major paradigm shift" that allows the State to "get out of the business" of regulating party selection likewise rings hollow. (Wash. Br. 32.) In fact, the State is attempting to have it both ways. On the one hand, it seeks the benefits of party labels – including their role as "cues" for voters and the participation of the parties in publicizing

and differentiating the candidates. On the other hand, however, it denies the parties any role in determining which candidates are permitted to invoke those cues. Indeed, if the State truly wanted to get out of the "party" business, it would not choose party preference as the singular piece of information it provides to voters at a critical juncture in the election process.

The Ninth Circuit properly recognized that a political party's ability to endorse or otherwise advocate on behalf of its true standard bearer does not mitigate the burdens imposed by Initiative 872. *Washington State Republican Party*, 460 F.3d at 1122 n. 22. In a slightly different context, this Court has held that the First Amendment protects a corporation from being compelled to distribute a message with which it disagrees because to do so would force it to immediately speak out and disavow the message. This kind of "forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986). Yet this is precisely the type of "forced response" that Initiative 872 imposes upon the political parties if they are to stand any chance of differentiating between their preferred standard bearer and a candidate who identifies his or her "preference" for that party.[9]

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[9] This Court has also questioned the value of party "endorsements" as a means of curing the harm caused by allowing non-party members to select the candidates who will be associated with the party's name on the ballot. "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580. In addition, endorsements by party leadership "do not assist the party rank and

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Moreover, the parties' ability to communicate their message has been increasingly limited by state and federal campaign finance laws. As Justice Kennedy noted in his concurrence in *Jones*, such laws "place strict limits on the manner and amount of speech parties may undertake in aid of candidates." *Jones*, 530 U.S. at 588 (Kennedy, J, concurring). Many states, including California, limit the amount that can be raised by a political party in support of (or opposed to) candidates. *See, e.g.*, CAL. GOV'T CODE § 85303 (West 2007) (imposing $25,000 limit on contributions to a political party for candidate-related purposes). These limits necessarily reduce the amount of money that can be spent – and therefore the level of communication that can take place to voters – while measures such as Initiative 872 would increase the need for the parties to actively educate the public about the differences among the candidates claiming to "prefer" the party. In fact, the need for such public communication would be expanded from the general election to include the primary election, an election in which the parties would not typically be required to use their limited resources.

On the federal level, political parties are literally defined in relation to their candidates. 2 U.S.C. § 431(16) (2007) ("political party" is an organization or association "which nominates a candidate . . . whose name appears on the election ballot as the candidate" of such organization or association). Federal law also provides that a political party may make "coordinated party expenditures" which are much higher in amount than the coordinated expenditures (or contributions) that can be made

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file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders"). *Id.* at 581.

by ordinary non-party political organizations. 2 U.S.C. § 441a(d) (2007). In the last election, political parties were able to spend $39,600 on a candidate for the House of Representatives as opposed to a $5,000 limit for other political organizations. But 441a(d) money can only be used for a "general" election; it cannot be used in the primary when, under Initiative 872, the parties would need it the most to educate voters about *their* preferred candidates and differentiate among candidates expressing the same party preference. Finally, federal law exempts certain "grassroots" political activity for a party's "nominee" from the spending limits; under Initiative 872, if there is no such "nominee," it is unclear whether the expenses of such grassroots communications would continue to be exempt, creating a further limitation on the party's ability to publicize its support for, or opposition to, particular candidates using the party label.

Thus, to the extent appellants argue that the burdens imposed on political parties by Initiative 872 may be mitigated by the parties' own efforts to differentiate between their preferred standard bearers and those who would misappropriate their label, their arguments are constitutionally unsound and should be rejected.

III. The State Has Shown No Compelling Interest and Any Legitimate State Interests Are Outweighed by the Associational Rights of the Political Parties

The State of Washington suggests that any burdens imposed by Initiative 872 are justified by its interest in having qualified voters cast their votes effectively, regardless of their political persuasion, or its interest in an "[i]nformed electorate." (Wash. Br. 32; 30-33.) Not even the

State claims that these interests are compelling; even if these "interests" are legitimate, they are far outweighed by the burdens imposed on the political parties' rights of association.

Washington posits that Initiative 872 will assist voters in casting their votes effectively because it permits "broad access" to the primary ballot and because "voters are not limited to voting for the candidate of a single party." (*Id.* at 30.) However, the "increased access" here favors only candidates who wish to identify with a political party but who would not be selected by the party as its standard bearer, and voters outside the party who wish to influence the selection of the party's candidates. For party members who wish to see their true "standard bearer" in the general election, choice and "access" have actually been limited. Likewise, for party members who prefer that party candidate-selection be done by popular party vote rather than by a convention (or other non-public process), their choice and "access" have been limited.[10] Finally, for voters who wish to support independents and minor parties who previously were included in the general election but are now likely to be excluded in the "winnowing" process, choice and "access" are similarly reduced.

Indeed, it is precisely for these reasons that Initiative 872 effectively subverts the party's right to select its own standard bearer for the general election ballot: Any increase in the "choices" given to non-party voters comes directly at the expense of the party's right to self-determination.

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[10] *See, e.g.*, *Jones*, 530 U.S. at 581 (endorsements by party leadership "do not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders").

Under the guise of providing greater "choice" to voters, Initiative 872 exhibits precisely the same constitutional infirmity as the blanket primary struck down in *Jones*: By allowing all voters – regardless of their political persuasion – to "choose" which candidate will carry the party's label on to the general election ballot, it is the choice of those voters rather than the choice of the party members that is outcome-determinative. This is contrary to the Court's clear holding in *Jones* that the First Amendment protects the exclusive rights of political parties to select their standard bearer, free from outside interference.

Nor can the State legitimately assert that its interest in ensuring an "informed electorate" justifies the burdens imposed by Initiative 872's "party preference" provisions. While the State understandably seeks to downplay the connection between a candidate's stated party preference and any inference of "affiliation" or "membership" with the political party, the only possible informational value in providing such a "preference" to voters lies in the perceived connection between the values espoused by the party and those of the candidate. But Initiative 872 provides no mechanism for ensuring that candidate's "preferred" party is, in fact, representative of his or her political beliefs or vice versa. This "disconnect" completely undermines any argument that the stated preference serves any legitimate informational purpose. Again, even if the State has a legitimate interest in providing additional information about candidates to voters, that legitimate interest is far outweighed by the parties' right not to be subject to the "forced association" created by the singular use of a party label at a critical point in the candidate-selection process.

CONCLUSION

In *Jones*, this Court held that a political party has a First Amendment right to control the content of its own message, and nowhere is that right more important than in selecting the candidates who will carry the party's label on the state-printed ballot. Initiative 872 is a bald attempt to subvert that control. Indeed, the express purpose of Initiative 872 is to forcibly alter each party's message to make it more appealing, in its sponsors' eyes, to voters who do not adhere to the party's platform. But, as *Jones* observed, control of this message is essential to a party's ability to function as a meaningful vehicle of political expression for like-minded voters. The Ninth Circuit correctly determined that Initiative 872 stripped political parties of that control and severely burdened their associational rights without any compelling state justification. Accordingly, the California Democratic Party respectfully requests that this Court affirm the Ninth Circuit's decision holding Initiative 872 unconstitutional.

Respectfully submitted,

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